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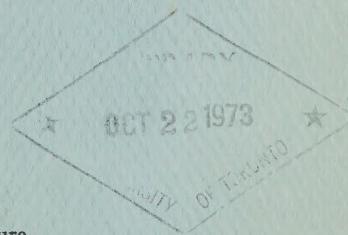


REPORT OF THE SELECT COMMITTEE
~~ON THE~~

~~HYDRO ELECTRIC POWER COMMISSION OF ONTARIO~~
NEW HEAD OFFICE BUILDING

1973

TABLED IN THE ~~LEGISLATIVE ASSEMBLY BY~~
THE ~~CHAIRMAN OF THE COMMITTEE~~
JOHN P. MACBETH, Q.C., M.P.P.



3rd Session, 29 Legislature
22 Elizabeth II

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October 2, 1973

TO:

THE HONOURABLE ALLAN E. REUTER,
Speaker of the Legislative Assembly of the Province of Ontario

Sir,

We, the undersigned members of the Committee appointed by the Legislative Assembly of the Province of Ontario on May 1, 1973 to examine and review the matter of and the circumstances surrounding the agreement for the construction of the new head office building for the Hydro Electric Power Commission of Ontario in accordance with the terms of reference established, have the honour to submit the attached report.

John P. MacBeth
JOHN P. MACBETH, Q.C., M.P.P.
York West
Chairman

James N. Allan

JAMES N. ALLAN, M.P.P.
Haldimand-Norfolk

R. Glen Hodgson

R. GLEN HODGSON, M.P.P.
Victoria-Haliburton

James E. Bullbrook

JAMES E. BULLBROOK, Q.C., M.P.P.
Sarnia

William Hodgson

WILLIAM HODGSON, M.P.P.
York North

Ian Deans

IAN DEANS, M.P.P.
Wentworth

William S. Newman

WILLIAM S. NEWMAN, M.P.P.
Ontario South

Murray Gaunt

MURRAY GAUNT, M.P.P.
HURON-BRUCE

James Renwick

JAMES A. RENWICK, Q.C., M.P.P.
Riverdale

Lorne C. Henderson

LORNE C. HENDERSON, M.P.P.
Lambton

Gordon W. Walker

GORDON W. WALKER, M.P.P.
London North



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MEMBERS OF THE SELECT COMMITTEE
ON THE
NEW HEAD OFFICE BUILDING
FOR THE
HYDRO ELECTRIC POWER COMMISSION OF ONTARIO

JOHN P. MACBETH, Q.C., M.P.P., Chairman	York West
JAMES N. ALLAN, M.P.P.	Haldimand-Norfolk
JAMES E. BULLBROOK, Q.C., M.P.P.	Sarnia
IAN DEANS, M.P.P.	Wentworth
MURRAY GAUNT, M.P.P.	Huron-Bruce
LORNE C. HENDERSON, M.P.P.	Lambton
R. GLEN HODGSON, M.P.P.	Victoria-Haliburton
WILLIAM HODGSON, M.P.P.	York North
WILLIAM NEWMAN, M.P.P.	Ontario South
JAMES A. RENWICK, Q.C., M.P.P.	Riverdale
GORDON W. WALKER, M.P.P.	London North

RICHARD E. SHIBLEY, Q.C.	Counsel to the Committee
JOHN P. BELL	Assistant Counsel to the Committee
PAUL B. MOORE	Clerk of the Committee

On Tuesday, May 1, 1973, on motion by Mr. Winkler, seconded by Mr. Welch, as amended by Mr. Lewis, seconded by Mr. Renwick, it was ordered,

"That a Select Committee of this House be appointed to examine and review the matter *of and the circumstances surrounding* the agreement for the construction of the new Head Office Building for The Hydro Electric Power Commission of Ontario, and to report its findings and recommendations to this Assembly as soon as it may conveniently do so.

And that the Select Committee have full power and authority to employ counsel and such other personnel as may be deemed advisable, and to call for persons, papers and things, and to examine witnesses under oath, and the Assembly doth command and compel attendance before the said Select Committee of such persons and the production of such papers and things as the Committee may deem necessary for any of its proceedings and deliberations, for which purpose the Honourable the Speaker may issue his warrant or warrants.

And that the proceedings of the Committee be reported by the Hansard Office, such reports to be distributed as the Committee deems necessary."

The Committee consisted of eleven members ultimately composed as follows:

Mr. MacBeth (chairman), Messrs. Allan, Bullbrook, Deans, Gaunt, Henderson, Hodgson (Victoria-Haliburton), Hodgson (York North), Newman (Ontario South), Renwick and Walker.

On the 9th day of May, 1973 the Select Committee convened its organizational meeting. On that day, by motion made and unanimously carried, the Committee appointed Mr. Richard E. Shibley, Q.C., of the law firm of Shibley, Righton & McCutcheon, Toronto, Ontario, as counsel to the Committee to advise and assist it with the investigation of and the calling of evidence relating to matters relevant to the issues of the Committee's enquiry.

On the 15th day of May, 1973, the Committee met and, with the assistance of its counsel, defined the issues respecting which findings and recommendations might be expected from it. These issues are as follows:

1. Are the terms of the agreement, as they affect Ontario Hydro, financially and economically sound?
2. Does the agreement provide benefits and advantages which justify the decision to abandon previous plans for construction of a building owned and financed by Ontario Hydro?
3. Did Ontario Hydro take all steps necessary to obtain competitive proposals?
4. Did Mr. George Gathercole, members of the Ontario Hydro Electric Commission, the chief architect of Ontario Hydro and the members of the staff of Ontario Hydro, or any of them, in any way have their judgment respecting the agreement for the new head office building affected by any consideration other than what was in the best interests of Ontario Hydro and the people of Ontario?
5. Was the agreement of a nature and of such importance that Ontario Hydro should have submitted it for consideration on a policy basis to the Minister reporting for Hydro?
6. (a) Who was the person who alleged that there was a warning delivered by someone to one of the unsuccessful bidders that if he did not be quiet, he would never get another government contract?
(b) Was such a warning in fact ever delivered?
(c) If such a warning was delivered, by whom and to whom was it delivered?"

The Committee, on the 15th day of May, 1973, appointed as its assistant counsel Mr. John P. Bell, to assist Mr. Shibley in the conduct of the necessary investigation and other matters relevant to the enquiry.

The Committee also, on the 15th day of May, 1973, appointed Mr. Ronald Anson-Cartwright of the chartered accountant firm of Price Waterhouse & Co. to assist it in the analysis and interpretation of the relevant financial data referable to the making of the contract.

The Committee met and heard evidence for fifty sessions during the period commencing on the 22nd day of May, 1973 and ending the 17th day of September, 1973. The Committee heard from forty-four witnesses, covering seventy-five hundred pages of transcribed testimony and read two hundred and thirty-nine exhibits. The Committee sat concurrently with the House from the 22nd day of May, 1973 until the 21st day of June, 1973. Thereafter, by special order of the House the Committee sat, to the completion of its enquiry, during the summer recess.

The Committee deliberated upon its report over a period of six days. The report is in the form of a narrative of the sequence of events as they occurred. Having regard for the volume of evidence, the narrative is necessarily a distillation of the evidence upon which the Committee reached its conclusions. The conclusions and findings of the Committee are interspersed throughout the report. The Committee stresses that the report must be read as a whole to elicit therefrom its full intent and meaning.

Persons have been fully identified when first mentioned and thereafter, for convenience, referred to by surname only.

In the spring of 1971, Hydro embarked upon a revival of plans for the construction of a new head office building on its site on the South-west corner of University Avenue and College Street, in the city of Toronto. Considerations affecting the thinking of Hydro personnel were as follows:

- (1) In 1969 Hydro acted on the advice of the government to defer construction.
- (2) The space requirements for Hydro personnel were expanding at a greater than anticipated rate.
- (3) The leasing of space in a variety of buildings resulted in loss of efficiency and additional cost.
- (4) Delay was resulting in ever-increasing construction costs due to inflation.
- (5) Hydro's financial requirements for other purposes were increasing dramatically.

Hydro officials became aware of the lease-purchase concept for the construction of its building by an examination of the arrangements made for the Ontario Institute for Studies in Education (O.I.S.E.) building, with which building and arrangements they were impressed. They viewed the concept with enthusiasm as one which might resolve many of the considerations listed. This led to communications with Canada Square, which had undertaken the O.I.S.E. development.

On June 11, 1971, Mr. Kenneth Candy, Chief Architect for Hydro, met with Mr. Gerhard W. Moog, President of Canada Square Corporation Limited, and reported thereon by memo dated June 14, 1971 wherein he expressed enthusiasm about the O.I.S.E. concept and about Moog. The memorandum records Moog as having said to Candy, "He says that he is going over to Germany as an advisor to the Premier of Ontario to arrange further financing for the province." This representation was false. However, this representation impressed Candy. It also helped establish Moog's credibility and overall status with Hydro. In fact, Moog never was intended to advise the Premier. A pleasure trip had been planned and the Premier had expressed interest in speaking to the Deutsch bank in Munich, with respect to international financial conditions. If the opportunity developed, Moog was to sit in on such meeting, but not as an advisor. At the same meeting Moog told Candy that, if the opportunity presented itself, he intended to look into European sources of funds for the head office building while in Europe with the Premier. Throughout the ensuing negotiations, the representations by Moog respecting the availability and lower cost of Swiss funds, as well as the advantages to Hydro resulting from his purported access to such funds, was a factor affecting Hydro in the selection of Moog as the developer. The misrepresentation relaxed Hydro's assessment of subsequent claims by Moog.

Reviewing the evidence as a whole, it appears that Hydro personnel were conscious of the friendship between the Premier and Moog. The extent and nature of the weight given by Hydro personnel to this particular circumstance is not capable of precise and accurate assessment. It is the view of this Committee that it may have been one of the factors which weighed upon Hydro, although it must be stated that, in the opinion of some members of the Committee, it was a factor. Hydro personnel, being aware that Moog was a friend of the Premier, should have taken special care to ensure that the competition in no way favoured

Canada Square. Nevertheless, the Committee is of the opinion that all persons within Hydro involved in the decision-making process were at all times of the belief that their actions were in the best interest of Ontario Hydro.

On August 3, 1971, Mr. George Gathercole, Chairman of the Ontario Hydro Electric Power Commission, informed the Premier of Hydro's intentions to proceed with their building and that they had been examining the O.I.S.E. arrangements. The Premier and Moog were in Europe during the period August 9 to August 15, 1971. During that trip Moog did not reveal to the Premier his involvement with Hydro. On the one occasion when his involvement might have been made apparent, he took steps to avoid disclosure of his enquiries of Swiss bankers respecting financing for the Hydro building while in the presence of the Premier. Following their return, during a dinner in late August, 1971, Moog did disclose to the Premier that he had been approached by Hydro in connection with the new headquarters building. The Premier declined to discuss the matter and at no time from that date until after the signing of the contract on November 1, 1972, did Moog speak to the Premier about his dealings with Hydro.

Although the Premier was aware of the approach by Hydro to Moog as at August, 1971 and following, this Committee finds that Premier Davis took no step nor gave any direction to anyone which in any way assisted Canada Square to successfully negotiate a contract with Ontario Hydro.

On August 25, 1971, Moog met with Candy. On August 25 and 27, 1971, Mr. J. O. Dean, Manager Financial Policy Research of Hydro, initiated an exchange of memoranda with the Treasurer of Hydro and with the legal and financial departments of Hydro. On August 31, 1971, Candy remitted to Moog the annual report of Hydro which Moog in turn sent on to the Swiss bank. During July and August of 1971, Hydro undertook a re-examination of its original plans and also requested Moog to consider a lease-purchase arrangement employing such plans. These plans were costed at \$29 per square foot, and applying an escalation factor, the projected cost for construction alone was computed at \$34 per square foot. Moog declined to enter into a lease-purchase arrangement with such plans. Hydro, for its part, concluded that the plans were in any event obsolete and inefficient, with which conclusion this Committee agrees and finds that Hydro were justified in abandoning such plans.

On November 2, 1971 and November 8, 1971, there was an exchange of memoranda between Mr. H. J. Sissons, Assistant General Manager Services, and Mr. D. J. Gordon, General Manager of Hydro. The effect thereof was that specifications with broad but clear parameters should be prepared with a view to approaching a few strong and competent developers. On November 10, 1971 and November 18, 1971, Moog had an exchange of correspondence with the Swiss bank which he claimed before this Committee, brought an end to his dealings with the Swiss bank visited in August, 1971. He nevertheless represented to Candy that Swiss funds were available at $6\frac{1}{2}$ per cent by showing him a prospectus obtained from that bank. Canada Square and Candy also collaborated in preparation of design drawings. On November 22, 1971 Moog met Gathercole and discussed generally the capabilities of Canada Square as a development company. On the same day the general managers committee, consisting of seven key personnel of Hydro, met with Candy.

Memoranda dated November 22, 1971 and November 25, 1971 reflect an inclination to proceed with Canada Square without soliciting competitive tenders because it could provide "so favourable a rate of financing and so favourable an end rental". The instructions of Gordon of November 8, 1971 had not been implemented. It appears that at the meeting of November 22, 1971, he persisted in his earlier view, but the memorandum of November 25, 1971 prepared by Sissons, indicates that Gordon's instructions were being disregarded.

This Committee finds that during November, 1971, Candy and Gathercole were already of the view that Hydro should select Canada Square as the developer of the head office building. The Committee is unable to reach a conclusion as to why the intentions as expressed in the memoranda of early November were disregarded, other than their anxiety to proceed with the building without delay and their conviction that Canada Square was well-qualified to undertake the project.

Whatever may have been their intentions in November, during the months of December, 1971 and early January, 1972, Hydro was approached by a number of developers, including Horizon Development and Management Co. Ltd., Ellis-Don Ltd., Y & R Properties Ltd., and Cadillac Commercial Properties Ltd., the latter being a developer that did not make a submission. Each of Ellis-Don, Horizon and Y & R were given oral specifications and instructed to have their respective submissions tabled within a limited period of time; i.e. on or before January 24, 1972. They were also told that no design sketches should be prepared and the general import of the instruction was that the proposals sought were to be of a preliminary nature only. Ellis-Don was aware of the project as early as July, 1971 and doubtless was anticipating communication from Hydro regarding it. It is clear from the evidence of these other developers that they fully expected on-going negotiations and discussions for purposes of making more particular the terms of any lease-purchase arrangement that they might be prepared to enter into.

In February of 1972, Gathercole for the second time, raised the matter of the building with the Premier on the occasion of the opening ceremonies of Hydro's installation at Pickering. The Premier indicated to Gathercole that whatever was done, it should not influence the capital situation; i.e., should not require them to add to their borrowing. The exchange was such that Gathercole could fairly assume that the government would not object to Hydro proceeding with the office building. No detailed discussion as to the procedures adopted for the selection of the developer or otherwise took place. The Premier was aware that Moog was likely to be one of the contending developers, but there had not then, nor thereafter, been any communication from Hydro or Canada Square referable to Moog's involvement as one of the contending developers. The Premier was entitled to assume from this communication that Hydro was effecting a true competition and the Premier had no obligation in those circumstances to make any further enquiry, or take any further steps regarding the competition. The transaction contemplated by Hydro was one wherein the province was not to be asked to provide a provincial guarantee and there was no legal obligation on Hydro to seek approval of government for the transaction. To the extent that there was any obligation on the part of Hydro to keep government informed of its intentions, it did so by the communications between Gathercole and the Premier in the early part of August, 1971, at Pickering in February of 1972, by a letter communication of May 16, 1972, and the submission of a press release on July 21, 1972.

On February 7, 1972, the seed of discontent of Donald Smith, President of Ellis-Don Ltd., was planted by communication from Mr. Robert Tamblyn of Tamblyn, Mitchell and Partners, that Canada Square expected to be awarded the contract. Smith embarked upon a series of communications designed to bring about a more favourable consideration of his own submission. By memorandum of February 17, 1972 he expressed an intention to communicate with Mr. Richard Dillon, a member of Task-Force Hydro, the Honourable Mr. John White, then Minister of Trade and Development and Minister of Tourism, and others, to "open doors". On April 14, 1972 he wrote to Mr. John Bruce Cronyn, Chairman of The Committee on Government Productivity and a director of Ellis-Don, making reference to prior communication's with Mr. Colin Brown of London Life Insurance Company, who had in turn spoken to Gathercole and in which letter Smith requested Cronyn to put in a good word with the Honourable Mr. Darcy McKeough, then Treasurer of Ontario. On July 14, 1972 he recorded by letter to Cronyn his efforts through Mr. George "Ernie" Jackson, insurance salesman, to meet with Gathercole and the content of certain discussion had with Mr. J. J. Barnicke, Realtor. The letter states:

"I talked to Joe Barnicke last week and he suggested that I might jeopardize any future dealings with the government if I stirred anything up on this job and I might be wise to take Joe's advice and I would appreciate your comments, but I don't want to put you in any position of embarrassment at all."

The Committee finds that Smith did in fact have such a conversation with Barnicke. There was no purpose or circumstances which would induce Smith to misstate such facts in the letter to Cronyn. It is the opinion of this Committee that Smith sought to exploit many avenues of political influence known to him, without success, and doubtless leading to his expanded exasperation.

In addition, Smith approached Dillon, complaining of the manner in which Hydro had proceeded with its selection of a developer. This complaint appears to have occurred during the interval July 14, 1972, to August 21, 1972, the latter date being a date on which he wrote to Mr. Roger N. Seguin, a commissioner of Hydro who was suggested to him by Dillon.

On August 23, 1972, Moog retained Mr. Vernon Singer, Q.C., M.P.P., then Deputy Leader of the Liberal Party in the House, as legal counsel respecting the use of valuable commercial lands at the South-west corner of Yonge and Eglinton in the city of Toronto. He also raised the matter of a continuing retainer at this time. Singer had acted as legal counsel to Moog on previous occasions.

On August 25, 1972, Hydro issued a press release, different in content from the draft release of July 21, 1972.

On August 28, 1972 the secretary of Mr. James McCallum, Q.C., the solicitor retained by Hydro to prepare the contract with Canada Square, recorded the following communications from Moog and Candy:

(Moog) "Also asked me who, in this firm, would be dealing with the road closing? You had suggested you might get someone here to do it, but if you can't then he would suggest Vernon Singer, because he would be good to do the work politically, too. Then Mr. Candy called, with the same thought—wants to meet with you and Moog (Moog didn't mention having Candy at the meeting)."

On September 1, 1972 at an informal meeting convened prior to the Commission meeting, Seguin outlined to the Hydro Commissioners the complaints of one of the developers as set forth in Smith's letter to him of August 21, 1972.

It is the view of the Committee that while the Committee does not agree with Smith's methods of complaint and considers his efforts to employ political influence as unacceptable, he was nevertheless justified in recording with the Commission, through Seguin, a vigorous complaint as to the manner in which Hydro had selected Canada Square as the developer for the project. The Committee rejects the suggestion that an approach to Seguin was less proper than an approach to the Commission at large. It may have been preferable if Smith had not marked his letter "personal and confidential." Nevertheless, Smith was entitled to rely upon his communication to Seguin as a communication which would be reviewed and acted upon by the Commission. The Commission failed to act prudently when they received the complaint during this first of two periods of intensive activity regarding the contract.

On March 9, 1972, Gathercole gave instructions for the preparation of a submission to be presented to the Premier and members of Cabinet early in April, 1972. A memorandum dated April 10, 1972 was prepared by Candy and Mr. F. K. Mink, Integrated Financial Planning-Hydro, although such was never the subject of a submission either to the Cabinet or to the Premier.

In March of 1972 Mr. Milan Nastich was appointed Assistant General Manager of Finance within Hydro and brought to bear upon the efforts of Hydro a scrutiny that theretofore had not been applied. His various memoranda made clear his concern about the lack of supporting data and the mode of analysis and comparison that had been employed by Hydro. In particular, he raised questions as to the pro-rating that had been effected by Hydro to bring about arithmetic results which made the Canada Square proposal compare more favourably with those of the other three developers. Without pro-rating, the submission made by the three competing developers resulted in a rental rate lower than that of Canada Square. The memorandum of Mink and Candy of April 10 persisted in presenting a comparison on a pro-rated basis. Much evidence was adduced as to the validity of this process, and without detailing the criticisms thereof, the Committee has concluded that pro-rating, although of some use, was not a valid basis of comparison. The Committee is critical of the premises of comparison adopted by Hydro in that:

- (a) It did not communicate to the other three developers that Hydro was proceeding on the basis of a building having a quality of \$34 per square foot.
- (b) Hydro did not advise the other developers that it was prepared to assume the risk of exchange fluctuations.

- (c) The basis of pro-rating was based on a definition of "cost" incorporating only three elements whereas in the ultimate result Canada Square was permitted an evaluation based on an "appraised value" as hereinafter discussed.
- (d) Hydro failed to make known to the other developers that a pro-rating process was being applied.
- (e) The report of April 10, 1972 implies a comparison of design concepts, whereas in fact the other three developers were told not to submit designs and Candy had, on the other hand, assisted in the designs submitted by Canada Square.

The Committee incorporates by reference the reasoning of Mr. Anson-Cartwright as set forth in his report, Exhibit 237, for rejecting pro-rating as a proper criterion for the selection of the best rental proposed.

It is also of note that not only was there a failure to follow through with competing developers, but there does not appear to have been any effort to negotiate the base rate \$4.92 per square foot propounded by Canada Square. In this respect the financial people within Hydro did research which they viewed to be the benefits to the developer, including benefits by way of capital cost allowance, a profit between the cost of funding and the \$4.92 rental rate, a construction profit, and even a profit respecting the allowance for design. None of these factors appear to have been employed on the part of anyone negotiating for Hydro in an endeavour to reduce the rental rate. Rather, as at the time of the submission on January 24, 1972, the proposal of Canada Square was one wherein the rental rate remained a variable; i.e., \$4.92 to \$5.25 and the \$4.92 was even then the highest rental rate submitted by any of the four developers. The actual rental rate was to depend upon the success of Canada Square in obtaining \$20,000,000 in Swiss francs at 6½ per cent interest and the balance in United States or Canadian funds at 7¾ per cent interest.

On March 28, 1972, Mink requested Candy to follow up with the developers to elicit certain information from them, including whether the financing arrangements were secure and the type of financing proposed. Candy followed up with Canada Square and was advised by Moog at a meeting of March 30, 1972, that the financing was secure as to \$20,000,000 from Swiss sources at 6½ per cent and that Canada Square would absorb the government tax relative thereto. Moog also repeated that the balance of funds would likely be U.S.

The Committee is disturbed by the coincidence of data found within the Hydro report of April 10, 1972 and data emanating from Canada Square. In this regard a memorandum prepared by the solicitor for Canada Square on March 28, 1972 was provided to Canada Square for the apparent reason of assisting in the preparation of the April 10, 1972 memorandum. In addition, appendix B of the April 10, 1972 memorandum would indicate that either the document was shown to Moog to assist him to know its content, or Moog himself was contributing information for inclusion in that report. In any event, the exchange of information passing between Moog and Candy at a point of time when no decision had yet been requested of the Commission, and in respect of documents upon which the Commission would be asked to rely in making its decision is a matter of considerable concern to this Committee. The Committee is similarly disconcerted by the content of a July 18, 1972 memorandum of Moog to his file with purports to set forth matters discussed at a meeting on July 18, 1972. The memorandum indicates that the range of maintenance costs proposed by other developers was known by Moog at a time prior to the deliberations of the Commission on July 19, 1972.

It is the opinion of this Committee that the overall circumstances respecting the purported opportunity to other developers to compete for the project indicate that there was not a serious intent on the part of Hydro to deal otherwise than with Canada Square. Not only were the pre-submission opportunities unequal in terms of information provided and time afforded to prepare submissions, but evidence of subsequent events indicates that there was little if any follow-through with any developer other than Canada Square and no effort to make an in-depth enquiry as to the terms upon which the remaining three developers who were expressing interest might be prepared to contract.

The lack of real assessment in the selection of Canada Square is best evidenced by the memorandum of Candy of February 1, 1972 wherein he purports to recommend the selection of Canada Square at a point of time when there was no possibility of making an analysis or comparison of the various proposals.

The Committee therefore finds that Hydro personnel did not obtain all necessary information to make a valid comparison of the proposals and did not take all steps necessary to obtain competitive proposals.

Part of the advice given to Gathercole in February, 1972 by the Premier was that he should speak to McKeough, the then Treasurer, about the project. Gathercole took the opportunity of a trip to Japan during the latter part of April, 1972 to discuss the head office with McKeough. On this occasion the report of April 10, 1972 was in the possession of Nastich who was also on the trip. McKeough suggested that the Ministry of Government Services be asked to review the transaction in view of its previous experience. Gathercole wrote to the Premier a letter dated May 16, 1972 requesting his advice as to the involvement of the Ministry of Government Services. This letter received no response from the Premier, nor anyone in his office, although the original of the document contains a notation that the Premier did speak with Gathercole some time prior to June 9, 1972 and confirmed that Government Services should be involved. The Committee accepts the evidence that the information contained in the notation is incorrect.

It appears to the Committee that Gathercole interpreted the lack of any response to his letter of May 16, 1972 as an indication that the government had no objection to proceeding with the project and further, that the government had no interest in perpetuating the idea that the Ministry of Government Services should make an evaluation of the transaction.

The only additional communication between Hydro and government pending the formal contracts of November 1, 1972, was the submission of a draft press release on July 21, 1972. The covering letter was directed to Mr. James Fleck, the chief executive officer of the Premier, and indicated that Gathercole wished to insure that the action as disclosed by the release was "not in conflict with the Premier's judgment". According to the records of Hydro, this letter was not answered. However, a letter prepared by Fleck dated August 8, 1972 indicated that the position of the Premier was that although the Premier should be kept informed, the judgment was to be supplied by the Commission. Presuming upon the lack of receipt of this letter by Hydro, it appears to this Committee that Hydro again interpreted the lack of response as an indication that the action as outlined in the press release did not conflict with the Premier's judgment.

The Committee has some concern about the lack of formality with which representatives of government dealt with requests for advice and direction by Hydro. The Premier made it clear that the government's position referable to Hydro was that Hydro was an independent entity, self-regulating and without supervision by government, save and except in those instances when the guarantee of the province for its financing was required. Notwithstanding this legal relationship, this Committee is of the view that government is for practical purposes involved with decisions taken by Hydro. A more definitive method of dealing with requests for advice by Hydro should have been devised.

In a memorandum dated July 18, 1972, Moog purported to record an agreement with Candy regarding the wording for the computation of "cost" but that they "would not finalize the language at this moment to avoid questioning by the Commission in tomorrow's meeting".

Candy asserted that this was a false statement by Moog and was corroborated in this respect by other evidence. This Committee finds as a fact that Mr. Moog's memorandum to that extent is false. The Committee accepts Candy's evidence that Moog had agreed that "cost" would only include elements of construction cost, interim financing and design fees. In addition, there was an understanding that the cost of construction incurred by Canada Square would be disclosed.

The draft agreement prepared by Mr. Elmer Houser, Q.C., a partner assisting James McCallum, dated September 15, 1972 includes provision for the "cost" to be computed as aforementioned and provides for the production of documentary proof of the cost incurred by Canada Square. Both these terms were later varied to the prejudice of Hydro.

On June 29, 1972, Nastich was continuing to press for an analysis of the validity of the overall transaction and in particular, the cost relationship between financing and construction. Unfortunately, he was on vacation when the meeting was convened on July 19, 1972, at which the commissioners approved of entering into a contract with Canada Square.

In a memorandum to Nastich of July 6, 1972, Dean reiterated that there was "no possibility of Hydro borrowing at Canada Square's 7 per cent rate in Canada" and that "Canada Square's proposal would look very different at different financing costs."

Moog was continuing to represent to Hydro that he had available to him European sources of funds at low interest rates, which would permit him to construct a building of higher quality at a competitive rental rate; i.e., if the cost of financing was low, a larger proportion of the rental rate could be applied towards an increased cost of constructing a building of higher quality. In addition, Moog was to agree to an abatement of the rental rate if the interest rate was lower than 8 per cent. Moog was assuring Candy as at July 18, 1972 that he then anticipated that the whole of the financing would be Swiss and Candy, in turn, communicated this circumstance to the commissioners at their meeting of July 19, 1972. The Committee finds that it was salient to the decision of the commissioners at their meeting of July 19, 1972 to enter into an agreement with Canada Square, that as at July 19, 1972, Moog represented he anticipated all of the long-term financing would be obtained from Switzerland with consequential benefits to Hydro as aforementioned.

Proposals were received in January, 1972. It is the view of this Committee that the Chairman of Hydro should have brought the matter before the commissioners much earlier in point of time than the end of June, 1972 and permitted more involvement and supervision by the commissioners. The consequences of this mode of proceeding created a self-imposed additional responsibility on Gathercole for the failings of the Commission.

During the period July 19 to November 1, 1972, the parties were engaged upon the drafting of formal documentation. Mr. McCallum was retained as outside counsel. He was not retained to assist upon the process of selecting the developer nor to negotiate basic terms, but rather to formally document agreements already made with Canada Square and negotiate only certain specified items such as sharing of the rent from the commercial areas.

At a meeting of August 3, 1972, at which Candy and counsel to Canada Square were in attendance, instructions were issued as to the terms of the agreement. By draft agreement and letter of August 24, 1972 Canada Square submitted Moog's version of the agreement. The letter purported to outline what Moog then considered to be the entitlement of Canada Square regarding the computation of "cost" of the building. This draft letter agreement contains elements of overhead, construction profit, royalty and other factors of cost which Hydro repudiated as never having been in the contemplation of the agreement with Canada Square.

The elements to be included in the computation of "costs" is highly significant in that it governs the amount up to \$45,000,000 which Canada Square is entitled to raise by way of an encumbrance upon the property. The abatement of rent, should the building cost less than \$34 per square foot, is also affected.

The dispute between Canada Square and Hydro respecting the definition of "cost" was still extant at the time of Commission meetings on October 26 and November 1, 1972.

The commissioners were then advised that Moog was reneging on a very basic term. The commissioners were aware that the phraseology sought by Moog to define "costs" would be without effect. The extensive enquiry as to the interpretation of the words employed, i.e. "appraised value" demonstrates the difficulties that will confront Hydro. It has thereby lost for itself, not only the benefits of the agreement between Moog and Candy, but also exposed itself to the possibility of Moog raising \$45,000,000 against the security of the building without investing that amount in the building and without abatement of rental to Hydro.

The failure of the commissioners to insist upon an agreement which included a term consistent with the original understanding, as between Moog and Candy, on so vital a term of the contract, is considered by this Committee to be at the very least, neglect of their responsibilities. The commissioners were duty-bound to insist upon proper terms, or to refuse to contract with Moog.

It was basic that a lease-purchase transaction in the circumstances confronting Hydro required the utmost good faith on the part of the developer. The commissioners should have been wary of entering into a contract wherein the developer had shown a degree of bad faith as to two basic terms; i.e., the definition of costs and the production of his invoices and records of costs. In addition, Moog was representing to A. E. Ames, Canada Square's financial agent, that a provincial guarantee was to be provided as a term of the agreement. The evidence is unequivocably clear that Hydro and the Government at no time agreed that a provincial guarantee was to be provided. As at November 1, 1972, Hydro well knew that Moog's representation that Canada Square had full Swiss financing at low interest rates was not a fact. His previous representations in that regard should have been measured against the overall circumstances confronting them at that time. The letter agreement respecting a sharing of any saving should the interest rates be less than 8 per cent

was meaningless. The rate had already been fixed at 8 per cent. No explanation was given for the insistence of Moog that the agreement as to "appraising" the building should be the subject of a separate letter agreement.

The cumulative effect of all that was known to the commissioners of Hydro as at November 1, 1972 required a much more careful examination into the transaction than appears to have taken place. The Committee was impressed with the dedication of Candy to obtain for Hydro a building of high quality on good terms. Candy is well qualified as an architect, but without experience that would enable him to cope with the financial and related terms of so complicated a transaction. This Committee finds that the General Manager's Committee delegated too much responsibility to Candy.

Subsequent experience has already demonstrated the difficulties that emanate from the form of the agreement. Mr. Rasmussen of Hanscomb Roy Associates, Quantity Surveyors, prepared a first report dated April 25, 1973, with a total cost of construction of \$33,000,000, including a contingency allowance of \$3,000,000. This calculation did not include any allowance for the cost of interim financing and design fees. Candy appears to have interpreted the contract as permitting wide discretion to Hydro to ensure that quality of the building be up to \$34 per square foot. He attempted to include carpeting at a cost of \$1,300,000 and a full sprinkler system at an added cost of \$500,000 as being within the "intent and framework of the preliminary drawings and specifications". This was rejected by Canada Square. On May 17, 1973, Rasmussen met with representatives of Canada Square to receive representations as to why the appraisal should be increased. His efforts to elicit from them particulars of cost, proved exasperating to such a degree that he left the meeting. All of this emanates from the lack of provision for particulars of costs.

In addition, it is clear from the evidence that Hydro and Canada Square have not yet agreed upon an interpretation of what is intended by the words "appraised value". The Committee is critical of the failure of the commissioners to provide the direction and authority which was sorely needed regarding negotiations during the latter part of October, 1972.

Hydro recognized that delay would confront them with increased costs of constructing the building, resulting from inflationary tendencies in the economy, a fact borne out by subsequent experience. The delay inherent in completing a revision of plans and use of the tender method was avoided by contracting with a developer. Canada Square was a developer with demonstrated qualifications and was prepared to commit itself to this one project to the exclusion of other undertakings. It also supported the concept of commercial development by way of a concourse with retail stores. Its methods of construction were likely to provide a building with a high efficiency factor, something which was sorely lacking in the building originally planned. In addition, Hydro sought to effect substantial savings respecting what would otherwise have been the rental costs in buildings owned by others. Hydro contended that it should integrate its personnel in a head office building on property owned by Hydro and adjacent to existing Hydro facilities. Hydro's decision to proceed on a lease-purchase basis met the requirement of government not to impose a burden on the borrowing capacity of Hydro and the province in the capital market. Gathercole confirmed that these were the basic tenets of Hydro's decision to proceed immediately on a lease-purchase basis, and that Hydro would otherwise have constructed the building with its own funds in the usual manner.

The question remains as to whether the best terms of such an arrangement were negotiated by Hydro. As already indicated, Hydro did not effect a true competition among developers. The Committee considers that the proposals of Y & R Properties Ltd., and Horizon Development and Management Ltd., warranted more careful evaluation.

Hydro does not appear to have taken advantage of its negotiating position relative to the benefits available to the developers. The building is fully funded by mortgage financing by reason of Hydro's covenant without equity investment by the developer. Canada Square was a corporation without assets other than some construction equipment at the time of entering into the agreement. It is the security of the building and the covenant of Hydro which is relied upon to finance the structure. The developer is without risk as to vacancy of any office areas. Whereas Moog originally indicated that he would accept responsibility for

subletting 200,000 square feet of office area, ultimately Hydro assumed responsibility for the whole of the office premises.

The Committee was assisted by the report of Mr. Anson-Cartwright respecting the elements of profit of Canada Square as follows:

- (1) The total profit from financing for the thirty years on a before-tax basis would approximate \$3,986,000;
- (2) The construction profit to Canada Square is incapable of estimation and will never be known to Hydro by reason of the right of Canada Square to withhold its costs of construction;
- (3) The difference between the actual cost of construction including a construction profit and the appraised value as contemplated by the agreement may permit Canada Square to realize any excess of appraised value over actual costs, without abatement of rental;
- (4) An additional element of profit to the developer which was considered by Hydro's financial personnel and Anson-Cartwright was the after-tax profit resulting from cash flow. This element of profit depends upon the allowance of depreciation to the developer by the Department of National Revenue about which allowance there is an issue. All developers who made submissions proceeded upon the basis of claiming capital cost allowance, although the files of Canada Square produced to the Committee were devoid of the particulars of the elements of costs and profit found in the files of the other three developers. Whereas Anson-Cartwright was of the opinion that Canada Square would be entitled to claim depreciation, McCallum, solicitor for Hydro, was of the opposite view. The Committee considers the salient figure to be the calculation of the present value of the future stream of after-tax profit; i.e., \$5,891,000.00. Subject to the issue as to the allowance of depreciation, this figure, which is the benefit to Canada Square the day the building is completed, remains constant regardless of the approach taken regarding the computation of the total profits over the term of the lease.

The Committee is of the view that the allowance of \$1.45 per square foot for maintenance is reasonable. Whether this allowance contains any element of profit or loss is uncertain.

After studying the arrangements made relating to the commercial space, the Committee is of the opinion that a more provident arrangement could have been negotiated by Hydro.

Having regard for the various elements of profits as outlined above, and the fact that Hydro was providing the land, the Committee expresses concern that Hydro may not have negotiated an agreement for the lowest rental rate available.

Whereas Hanscomb Roy Associates, the appraisers retained by Hydro, originally estimated the cost of construction at \$33,000,000, following the receipt of information provided by Moog which continued to July 4, 1973, they effected an upward revision of such cost to \$37,499,000, inclusive of additional allowances. Canada Square will also incur costs of interim financing and design fees to be added to the costs of construction.

In early November, 1972, Moog again raised with Singer the question of his continuing retainer in connection with the use of the land at Yonge and Eglinton. The retainer was raised again by Moog towards the middle of November, 1972. They agreed to a retainer of \$25,000 per annum, payable in quarterly installments commencing January 1, 1973.

The Committee considered whether the Premier was aware of the objections by Ellis-Don during the period of the summer of 1972 and in November of 1972. This Committee finds that throughout the summer period of 1972 there was nothing brought to the Premier's attention which would require him to rethink the assumption that he made in February 1, 1972; i.e. that the competition was proceeding properly.

By November 7, 1972, Mr. Fleck was aware of pending enquiries by the press and had been informed by Cronyn of the Ellis-Don complaint. On November 9, 1972, Fleck asked Gathercole to provide a narrative outlining the transaction and the manner of selecting Canada Square. This was done by memorandum dated November 15, 1972 which was forwarded by Gathercole to the Premier on November 16, 1972. On December 1, 1972, Mr. Robert Nixon, Leader of the Opposition, tabled questions in the House. November, 1972 was the second period regarding which the Committee made an in-depth review of the conduct of various parties.

The answers to Nixon's questions were prepared by Hydro and tabled by the Premier on December 14, 1972. This Committee finds that the information provided by Hydro both in the narrative dated November 15, 1972 and in the answers to Nixon's questions was misleading. In particular, the information purports to indicate a rental of \$4.84 per square foot and a cost of financing of \$3.35 for a net difference of \$1.49, out of which maintenance costs would be incurred. The actual rental rate was \$4.92 and the cost of financing was \$3.24, for a net differential of \$1.68 per square foot. The Committee views the difference in calculations to be material in terms of the net amount available to the developer. The answer prepared by Hydro infers that the whole of the differential between the rental rate and the cost of financing is the "maintenance component."

The Committee is particularly critical of the answer to the question: "What are the names of the other contenders and what amount did they tender?" In this respect the answer purports to indicate that all developers were requested by Hydro to make submissions, that all such proposals were discussed with each developer individually. It reads as though there had been subsequent follow-up with each developer, and that the selection of Canada Square as the successful developer was the result of a true competition with equal opportunity for each developer to make out its best case. On the evidence heard by the Committee with respect to the nature of the competition, and the evaluation of the proposals submitted, the Committee is of the opinion that the answer to this question was significantly misleading.

Any person who is required to provide information to the Premier or to any other minister of the Crown in order to enable answers to be given to questions asked in the Legislature is under an obligation to act in good faith, and to ensure that such information is accurate and complete. Answers which are misleading violate that duty and warrant the most severe censure of the persons responsible therefor.

During the course of the hearing there was a singular lack of respect shown in certain instances for the Legislative Assembly of the Province of Ontario. In our opinion, these matters may well be matters which could be cited as contempts. This Committee's purpose in noting the conduct of the parties hereinafter mentioned is to impress upon members of the business community, the legal profession, and citizens, a sense of greater obligation and duty to a Select Committee of the Legislature. This Committee recommends that no action be taken by the Legislature, but rather treats the recital of such conduct herein as a sufficient consequence to those involved.

In particular, Mr. John Cronyn, Mr. Donald Smith, his secretary Mrs. Anne Shuttleworth, and Mr. David Grant, the Secretary-Treasurer of Ellis-Don, are found to have suppressed documentary evidence relevant to the enquiry. Mr. John Brownlie, counsel to Ellis-Don, became aware of the suppression of evidence.

Gerhard Moog is found to have misled this Committee and obstructed its proceedings. He represented that the file containing communications with the Swiss bank was irrelevant and that he had had no further communication with that bank following November 18, 1971. He ultimately admitted that the whole of the documents within the file related to financing for Hydro and he was in communication with that bank as late as August 4, 1972. Moog further represented to this Committee during the period July 24, 1973 to August 29, 1973 that there was a need for confidentiality respecting the content of the file, and respecting the identity of Prudential Insurance Company of America which was providing the permanent financing. He

contended that such financing was not firm. The content of the file disclosed nothing that required it to be confidential. Prudential had no objection to being identified nor to the production of the commitment letters. Prudential considered the commitment made as one upon which it could be sued, which fact was made known to Moog in December, 1972. Personnel in Ames were aware of the lack of need for confidentiality by mid-July, 1973.

Gerhard Moog and Mr. George Finlayson, Q.C., counsel to Canada Square and Moog, displayed their contempt of the Committee by the refusal of Moog to give evidence on August 8, 1973. The conduct of Mr. Finlayson, by his advice to his client on that occasion, and his demeanor in general prior to August 8, 1973 was conduct which fell short of the duties of counsel appearing before a Select Committee.

The evidence of the November, 1972 retainer by Gerhard Moog of Vernon Singer was relevant to issues before the Committee having regard for the time and circumstances of the retainer. By reason of the fact that there was other and sufficient evidence regarding such issues upon which the Committee could reach its conclusions, the Committee considers it unnecessary to comment further on it.

The Premier made clear that a primary purpose for the appointment of this Committee was an enquiry into a report in the Toronto Globe and Mail dated April 30, 1972. This newspaper report included the following statement:

"A senior executive of one of the three unsuccessful firms that bid on the project, said he was called several weeks ago by a source close to the Ontario Cabinet and high in the Progressive Conservative Party and told the Globe and Mail was investigating. 'I was told to keep my mouth shut or I would never get another government job', the company official said."

The Committee finds that during the week of November 27, 1972, Smith made an anonymous telephone call to Mr. Jonathan Manthorpe, a Globe and Mail reporter, wherein Smith reported to Manthorpe that he had received a call from someone "close to the Premier's office", who told him "to be quiet." This Committee further finds that on the occasion of a telephone communication by Smith to Mr. Gerald McAuliffe, another Globe and Mail reporter, on April 16, 1973, and on the occasion of a personal interview at London, Ontario on April 17, 1973, Mr. Smith did provide McAuliffe with information as set forth in the press report. McAuliffe's evidence in that regard was corroborated by a note made contemporaneously and confirmed by Mr. E. Moser, an editor of the Globe and Mail.

The Committee finds that the person to whom Smith was referring in each of his communications with Manthorpe and McAuliffe was John Cronyn. The Committee further finds that Cronyn did telephone Smith with respect to his complaints about the Hydro head office building some time prior to the week of November 27, 1972.

The Committee has concluded that the purpose of the call of Cronyn to Smith was to warn him of the pending press investigation and that if Smith was going to say anything at all, he should avoid repeating "hearsay". Cronyn's interpretation to this Committee of what he meant by hearsay was: "The hearsay was that because the contractor, Canada Square, Mr. Moog was a friend of Mr. Davis, he was therefore being given the inside track, which is complete hearsay." The Committee finds that Cronyn did not say to Smith he should keep his mouth shut or he would never get another government job. Smith may have interpreted what was said in these terms, but had Cronyn used such phraseology, Smith would doubtless have reported the same to Manthorpe in his efforts to instigate a press investigation. Smith expanded upon what he had reported to Manthorpe in the course of his interviews by McAuliffe. Smith himself explains that he was thinking of advice given to him by Barnicke as recorded in the July 14, 1972 letter, rather than anything said by Cronyn when he referenced his company's involvement with government projects.

In making these findings, the Committee does not diminish the importance of the telephone call from Cronyn to Smith at the time and in the circumstances then prevailing. The evidence of Cronyn and Smith as to the precise import of the communication cannot be relied upon. Cronyn's position before this Committee was that early in 1971 he told Smith that "in view of the job I had with government there was nothing I

could do in the way of helping him." He also testified "I told him that at the beginning and he accepted it." Cronyn's position was also that he did not telephone Smith until after the contract between Hydro and Canada Square was a public issue, following the tabling of Nixon's questions on December 1, 1972. This latter position put in issue the time and content of the telephone call from Smith to Manthorpe as related by Manthorpe. The Committee was thereupon put to careful enquiry as to the possible involvement of other persons who might fill the description of persons "Close to the Premier's office". The positions taken by Cronyn required reassessment by the Committee following production of letters of July 14, 1972 and April 14, 1972, which letters had been wilfully suppressed by Cronyn and Smith. The Committee resolved the conflict of testimony by accepting the evidence of Manthorpe. The Committee finds that the only person close to the Premier's office who was in any way involved in the call to Smith was John Cronyn and that call was made on his own initiative.

Contributions were made by each of the four developers to the Progressive Conservative and Liberal parties during the years 1969 to 1973 inclusive. Particulars thereof were exhibited with the Committee. Canada Square contributed \$35,000 to the campaign funds of the Progressive Conservative Party in connection with the provincial election of October, 1971. The Committee finds that the contributions made to the Progressive Conservative Party were not a factor which influenced Hydro to select Canada Square.

The Committee recommends that the government and its institutions in the public sector should not be precluded from employing the developer-proposal method for the construction of buildings if there are sound financial or other reasons therefor. Guidelines should be established for this method. These guidelines should require the developer to make complete disclosure as a condition of dealing with a public body. The criticisms of the manner in which Hydro employed the proposal method should not be taken as a criticism of the system itself, but rather as a criticism of the manner of dealing by Hydro in this particular case.

The Committee also recommends that there should be imposed upon members of the Hydro Commission the same standard of duty as is now imposed upon directors of a corporation by provisions of the Ontario Business Corporations Act. The Hydro commissioners failed to meet such standard in respect of decisions taken relative to the head office building. The Hydro commissioners erred collectively in not ensuring that a proper competition occurred and further in failing to supervise the negotiations in a more exacting way. The commissioners also erred in not ensuring that the contract terms were such as would protect the interests of Hydro. There was an abdication of their responsibilities.

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